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In The

Supreme Court of the United States

OCTOBER TERM, 1965

AIRCRAFT & ENGINE MAINTENANCE & OVERHAUL, BUILDING, CONSTRUCTION, MANUFACTURING, PROCCESSING AND DISTRIBUTION AND ALLIED INDUSTRIES EMPLOYEES, LOCAL 290, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Petitioner,

v.

OOLITE CONCRETE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OOLITE CONCRETE COMPANY,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, a labor union,[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on February 2, 1965, which affirmed a damage judgment rendered in a suit brought under Section 303 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §187.

[1] Aircraft & Engine Maintenance & Overhaul, Building, Construction, Manufacturing, Processing and Distribution and Allied Industries Employees, Local 290, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit, rendered February 2, 1965, is reported in 341 F. 2d 210, and is appended at page 6a, *infra*.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on February 2, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1.

Where a union engages in picketing at a common situs in strict conformance with *Moore Drydock* standards, may a court or jury infer from such picketing "an object" proscribed by Section 8(b)(4) of the Labor Management Relations Act?

2.

Is a union, defendant in a damage suit brought under §303 of the Act, entitled to a jury instruction that so long as union did no more than engage in ambulatory and common situs picketing in strict accordance with criteria established by NLRB, and approved by this Court (known as the *Moore Drydock* criteria) there was a presumption that the picketing was primary and lawful?

3.

Is the legality under Section 8(b)(4) of the Labor Management Relations Act of union's am-

bulatory picketing of an employer to be determined by the same objective standards in a damage suit under Section 303 as are applied to NLRB determinations with respect to the same conduct under Section 10 of said Act?

4.

In the light of the Landrum-Griffin amendments of §303 of said Act, may an employer, having failed to establish through NLRB proceedings the existence of unfair labor practices, recover damages under §303 for the same conduct?

Statute Involved

Section 303 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §187, provides:

> "(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.
>
> "(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States, subject to the limitations and provisions of section 301 hereof, without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Sections 8(b)(4) and 10 of the Act, 29 U.S.C. §158(b)(4) and §160 (and §303 as written prior to the 1959 amendments) are printed in the Appendix, pp. 1a-5a, *infra*.

Statement

Petitioner, a labor union, represents, among others, employees of ready-mix concrete companies in the vicinity of Miami, Florida. A majority of the ready-mix concrete industry in the Miami area had been organized by June of 1962, at which time at least seventy-five per cent of the drivers of concrete mix trucks were organized (R. 149-150) and receiving the union scale of $2.07 per hour. Union contracts provided that these were to increase to $2.14½ on July 1, 1962 (R. 149).

Respondent, Oolite Concrete Company, was unorganized, and in June, 1962, was paying its concrete mix truck drivers $1.92 to $1.98 per hour. Union had made earlier abortive attempts to organize the Oolite drivers, but concluded that there was no possibility of a succesful organizing drive (R. 151). Thus, met with the competition of substandard wages, the union ". . . decided to make an effort to get the employees of Oolite, that is the drivers, to put whatever pressure they could on this company to increase their wages; or if we could, we hoped we could get them to quit their jobs with Oolite. In other words, any form of pressure exerted, that they could exert on their company to increase their wage scale and to eliminate the differential between the organized com-

panies and the unorganized companies." (R. 151-152).

Accordingly, union picketed, both at the Oolite plants (R. 15, 16, 29, 30, 117, 132, 135) and followed the Oolite concrete mix truck drivers to the construction sites in the Miami area. R. 120, 126, 127, 131, 133, 137 140, 142, 156, 161-168). The picket signs stated, (R. 153).

"OOLITE CONCRETE COMPANY DRIVERS
RECEIVE SUB-STANDARD WAGES
AND WORKING CONDITIONS.
TEAMSTERS LOCAL UNION 290"

At all times the picketing was conducted in strict compliance with the *Moore Drydock*[2] criteria, established by NLRB and approved by this Court;[3] i.e., the picketing was (1) limited to times when the situs of the dispute (the Oolite truck and driver) was located on the premises where the picketing occurred; (2) occurred when Oolite was engaged in its normal business at the situs; (3) took place reasonably close to the situs; and (4) clearly disclosed that the dispute was only with Oolite.[4]

The Oolite drivers spent substantial periods of

[2] 92 NLRB 547

[3] *Local 761, IUE v. NLRB*, 366 U.S. 667

[4] Pickets spoke to no one, except the Oolite drivers (R. 54, 155). Pickets handed handbills to any who inquired, advising that the dispute was only with Oolite (R. 121 and defendant's exhibit 1).

time at the construction sites,[5] where they added water to the mix (R. 43, 44, 45), changed the "slump" (R. 49, 86, 117), operated the mixer controls (R. 45, 46), and discharged the concrete as directed (R. 86) in cooperation with craftsmen employed by contractors engaged in construction (R. 85-87). Clearly then the mixer operation on the site was in performance of Oolite's normal business.

Ambulatory picketing, as above described, took place at various construction sites in the Miami area on June 7, 8, 11, 12, 13, 14, 15, and 20, 1962. (R. 156). Work stoppages by craftsmen employed by contractors working at the site occurred in four instances (R. 161-168); although even here several crafts remained at work.[6] At other construction

[5] See Plaintiff's Exhibits 6 and 6a, of which the following are typical, showing Oolite drivers engaged for periods of up to more than an hour in the making of concrete pours at the job site:

Trip Ticket Number	Time out	Time Del'd to Customer	Time started unloading	Time released by Customer	Time Back In
B 43116	8:45	9:15	9:35	10:25	10:59
B 43124	9:36	9:55	10:20	11:05	11:33
B 43158	1:07	1:30	1:45	2:50	3:19
B 43165	1:48	2:10	2:55	3:30	4:05
B 43580	1:03	1:25	1:45	2:20	3:02
B 43682	9:03	9:03	9:33	10:40	11:04

[6] At three of the construction job sites where picketing was carried on, work stoppages occurred. On the Volpe Federal Building job, picketing was conducted on June 7, 1962, but no work stoppage occurred (R. 71, 137). On June 8, 1962, picketing was again conducted and a work stoppage did occur, "the ironworkers walked off the job . . . it was taken care of quickly and all the other trades went back to work." (R. 68). At the Millman job picketing was conducted on two days in June (R. 60). Work stoppage by carpenters and ironworkers did occur (R. 61, 62), but the laborers continued to work (R. 61). Likewise, on the Prahl Brothers job, picketing was conducted on two occasions and there were some work stoppages (R. 53, 54), but the laborers and cement finishers continued to work (R. 53). To continue to deliver concrete to the construction job sites. Appellee contracted with a union concrete company to fulfill its obligations. No contracts that Appellee had with the general contractors for delivery of concrete to the construction job site were ever cancelled (R. 18-20, 25).

sites where the pickets appeared no work stoppages resulted (R. 120, 126, 127, 131, 133, 137, 140, 142, 146).

Oolite filed charges with NLRB alleging that petitioner union was engaging in unfair labor practices (secondary boycott) proscribed by §8(b)(4), and sought an injunction through NLRB, and §10(l) of the Act. The charge against the union was duly investigated by the NLRB Regional Director, but was found to be without merit and therefore was dismissed. Oolite did not appeal the dismissal (R. 114, 115 172-175).

Shortly thereafter Oolite raised the wages of its concrete mix truck drivers, and the picketing was voluntarily ended, "because we (the union) received information that we obtained our objective, that the company was going to give raises to their drivers." (R. 158).

After dismissal of the NLRB charge, and after the voluntary cessation of the picketing, the instant suit was filed on July 10, 1962 (R. 165). By motion to dismiss (R. 172) union objected to being put to trial for the alleged commission of unfair labor practices which NLRB, on the same facts, had found insufficient to support a finding that the Act had been violated. This defense was again asserted in the Answer, R. 175, ¶7 but was stricken on plaintiff's motion (R. 176-177).

Trial was to a jury on a record which showed nothing more than the peaceful ambulatory pick-

eting as above described. Union's motions for directed verdict (R. 180-184) were denied. Union thereupon proposed that the jury be instructed that so long as union did no more than engage in ambulatory picketing in strict accordance with the *Moore Drydock* criteria there was a presumption that the picketing was primary and lawful. Specifically the requested instruction was;

> "(Instruction No. 10): There is some evidence in this cause tending to show that picketing occurred at the construction site while concrete was being delivered and placed by employees of Oolite Concrete Company. In this connection the Court charges that if you should find from the evidence first that said picketing occurred when employees of Oolite Concrete Company were present at the construction site; second, that the employees of Oolite Concrete Company were at said time engaged in the normal business operations of Oolite Concrete Company at the construction site; third, that said picketing was conducted as closely as possible, without being guilty of trespassing through the location on said premises where the employees of Oolite Concrete Company had entered and were performing their work; and fourth, that the picket sign used in said picketing reasonably and clearly disclosed that the labor dispute was only with Oolite Concrete Company, the the defendant would be entitled to the presumption that said picketing was engaged in a proper and lawful manner, and that it was not engaged in for an unlawful objective within the meaning of Sections 303 and 8(b)(4) of the National Labor Relations Act."

The instruction was denied, and union objected to the failure to give this charge. R. 160.

The jury after some deliberation inquired as to "that part of the Judge's charge to the jury in regard to the legal point of the picketing and secondary picketing" (Tr. 495); was brought back into the courtroom and again instructed in *haec verba,* as originally, and was never instructed in accordance with union's request above set out. Verdict and judgment were for Oolite (R. 178-179).

On appeal the Fifth Circuit affirmed, holding there was no error in refusing to give the requested charge which "was not an accurate statement of the law to be given to the jury, since it was entirely too broad." R. 195, *infra,* Appendix, p. 12a. The Court of Appeals also "concluded . . . that the right of the employer to file such a suit . . . is not affected by the circumstance that the Labor Board declines to proceed with an unfair labor practice charge." R. 191, *infra,* Appendix, p. 8a. Finally, the Court of Appeals held: ". . . there was sufficient evidence here from which the jury could infer that an object of the picketing at several of the common sites was the prohibited one of coercing other employers from continuing their business relations with the appellee." R. 192, *infra,* Appendix, p. 9a.

The Court of Appeals listed five circumstances from which it held the jury could infer unlawful objective, viz: (1) "at one (of more than ten) location the pickets were not within sight of the Oolite employees *who were the only proper target of the*

signs carried by the pickets" (R. 192; Appendix *infra*, p. 9a, emphasis added); (2) the picketing was not continued where it did not cause an interruption; (3) not all the Oolite sites were picketed; (4) the Oolite headquarters were not picketed until 8:00 a.m., although the drivers left those premises at an earlier time; and (5) the effect of the picketing was to "break-up the relationship between the general contractors and Oolite." (R. 194), *infra*, App. p. 10a.

Although the evidence as to the picketing and the attendant circumstances is undisputed, and the jury was not required to resolve any testimonial controversey, certain of the "circumstances" found by the Court of Appeals are flatly contrary to the undisputed evidence; and all are irrelevant to a determination of whether the picketing was primary (and lawful), or secondary (and unlawful.[7]

In the view of the Courts below the test to be followed in distinguishing between lawful "primary" and unlawful "secondary" picketing is that announced by the Fifth Circuit in *Superior Derrick Corporation v. NLRB*, 273 F. 2d 891 (C.A. 5, 1960), from which the court quotes at length in the instant case (R. 194, Appendix, *infra*, p. 11a). Here, as in *Superior Derrick* the Fifth Circuit holds that "if there is an expectation or hope or a desire that

[7] The "circumstances" [(2) above] that the picketing did not continue where no interruption was caused is flatly contrary to undisputed evidence. (R. 120, 126, 127, 131, 133, 137, 140, 146). Nor is there any evidence that the effect of the picketing was to break up the relationship between the general contractors and Oolite [(5) above]. To the contrary, it affirmatively appears that Oolite did not lose any customers. (R. 18-20, 25).

employees of the secondary employer will cease doing business with the primary employer, then the Act bars that activity . . ." (R. 194, Appendix, *infra*, p. 11a). No mention is made of the Supreme Court's holding in *Carrier*, 376 U.S. 492 at 498-499, which holds to the contrary.

Thus, petitioner is here held in damages for engaging only in ambulatory picketing which is primary and lawful under traditional objective tests applied by NLRB and the Supreme Court; but which is made to become secondary and unlawful under the Fifth Circuit's *Superior Derrick* standards.

Reasons for Granting the Writ

1.

This is another in the line of cases[a] in which the Fifth Circuit has deprived workers of the right of primary picketing. Despite the Supreme Court's opinions in *Local* 761 *v. NLRB* (General Electric), 366 U.S. 667 (1961), and *United Steelworkers v. NLRB* (Carrier), 376 U.S. 492 (1964), which had singled out the Fifth Circuit's *Superior Derrick* opinion as an example of misapplication of the statute (366 U.S. at 678), the Fifth Circuit continues to follow and apply its decredited *Superior Derrick* case.

The result is that workers in the Fifth Circuit find that the very primary picketing activity which

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[a] *Superior Derrick v. NLRB*, 273 F. 2d 891 (C.A. 5, 1960); *Brown Transport Corp. v. NLRB*, 334 F. 2d 30 (C.A. 5, 1964); *Aircraft etc. Local 290 v. Schilling*, 340 F. 2d 286 (C.A. 5, 1965).

NLRB and this Court hold protected by the Act in §10 proceedings (29 U.S.C. §160), becomes unlawful and the basis for an award of damages in an action brought under §303 (29 U.S.C. §187) of the same statute.

2.

The difficult and oft recurring problem of making a balance between workers' right to primary picketing and the interest of a "secondary" employer to be free from picketing, has plagued NLRB and the Courts since the enactment of the Taft-Hartley Amendments in 1947. As this Court has noted the NLRB "modified and reformed its standards on the basis of the accumulating experience."[9] and concluded that when [as here] the situs of the primary employer was "ambulatory" there were four objective standards to be applied in determining whether the challenged picketing was primary and therefore lawful, viz:

> (1) that the picketing be limited to times when the situs of dispute was located on the secondary premises, (2) that the primary employer be engaged in his normal business at the situs. (3) that the picketing take place reasonably close to the situs, and (4) that the picketing clearly disclose that the dispute was only with the primary employer.

This Court specifically approved these objective standards in *General Electric*[10] and *Carrier*,[11] and

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[9] *General Electric*, 366 U.S. at 375.
[10] 366 U.S. 667 (1961)
[11] 376 U.S. 492 (1964)

since those decisions a definitive line has been drawn by which the "primary" or "secondary" nature of the picketing may be ascertained. The Fifth Circuit refuses to observe this line.

To the contrary, the Fifth Circuit permits a jury, instructed in the literal language of the statute, to improvise its notion of the "object" of the picketing, without regard to the guides by way of objective presumptions which the Supreme Court has held must be applied in the enforcement of the statute.

Through eighteen years of experience with the statute, NLRB and the Supreme Court have arrived at the point where picketing in accordance with *Moore Drydock* standards is primary, and thus lawful, as a matter of law. And primary picketing remains primary, and lawful, despite its secondary effects and despite the "intention" or "hope" of the picketers that all who observe the picket will cease aiding the employer involved in the primary dispute. See *United Steelworkers v. NLRB*, 376 U.S. at 498-499, where it was held: ". . . Congress not only preserved the right to strike; it also saved 'primary picketing from the secondary ban. Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been *aimed at all those approaching the situs* whose mission is selling, delivering, or otherwise contributing to the operations which the strike is endeavoring to halt.'" (Emphasis added). Yet the Fifth Circuit continues to insist that "the Oolite

employees . . . were the only proper targets . . ." of the picketing. (R. 192, App. *infra*, p. 9a.)

3.

In any event, rules of law established by NLRB decisions and approved by this Court as to what conduct constitutes an "unfair labor practice" ought to be controlling in a district court inquiry as to the existence of the self same "unfair labor practice."

This Court has reiterated in other contexts the necessity for the establishment of a coherent federal common law of collective bargaining "which the courts must fashion from the policy of our national labor laws" *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). If, as the *Lincoln Mills* case states: "The Labor Managament Relations Act expressly furnishes some substantive law," that substantive law cannot mean one thing when applied by NLRB, and another when applied by a court. Yet the holding below inflicts a large damage award against workers solely for conduct which NLRB would not enjoin.

4.

Finally, this case like *Aircraft, etc., Local* 290, *etc. v. Schilling*, now pending on application for certiorari, No. 1057, October Term, 1964, poses the question as to the effect of the 1959 Landrum-Griffin Amendments of §303(a).

By these amendments the former detailed specification of the proscribed activity in §303(a) was deleted; and the amended statue substituted the requirement that no labor organization shall "engage in any activity or conduct *defined as an unfair labor practice* in section 158(b)(4).", emphasis added.

The Board's *exclusive* competence to ascertain the existence of unfair labor practices has been clear since the days of the Wagner Act. See Section 10(a), 29 U.S.C. §160(a). Congressional excision of detailed specification of the basis for damage award and substitution of reference to "unfair labor practices," as to which the Board's competence is exclusive, is strong indication of Congressional intent that prior resort to the Board is a necessary predicate for damage action.

Prior to the 1959 amendments §§8(b)(4) and 303 defined in identical language the proscribed boycott activities. Violation of the former led to administrative order, enforceable in the Court of Appeals. Violation of the latter was the basis for district court action and damage award.

Under the prior Act it was held that conflicting findings in the two separate proceedings could each stand; and that each fact finding agency was entitled to make its own decision. Thus, an NLRB finding that picketing was primary and lawful was affirmed at the same time a damage award based on a district court jury's finding that the very same picketing was "secondary" and thus unlawful was likewise affirmed. *United Brick & Clay Workers v.*

Deena Artware, 198 F. 2d 637 (C.A. 6, 1952); *NLRB v. Deena Artware,* 198 F. 2d 645 (C.A. 6, 1952). Cf. *International L. & W. Union v. Juneau Spruce,* 342 U.S. 237 at 244 (1952).

The result under the former statute in *Deena* has been severely criticized in the law journals. While eschewing mechanical and absolute application of the primary jurisdiction doctrine to the complete ouster of court action, Professor Louis Jaffee notes in "Primary Jurisdiction," 77 Harv L. R. 1037 at 1052, that: "presumptively a legal system should insofar as possible avoid contradiction, and the complacency with which the (Sixth Circuit) court in *Deena* rationalizes its result does it little credit."

The importance of allowing the Board to determine the existence of unfair labor practices, especially as to §8(b)(4)(A), was emphasized by Justice Frankfurter in the *General Electric* case, 366 U.S. at 674.

> ". . . it is not surprising that the Board has more or less felt its way during the fourteen years in which it has had to apply §8(b)(4)(A), and has modified and reformed its standards on the basis of accumulating experience. *'One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration.'* Republic Aviation Corp. v. NLRB, 324,

U.S. 793, 800, 89 L ed 1372, 1378, 65 S Ct 982, 157 ALR 1081." (Emphasis added.)

Accordingly, it would appear that under the amended statute resort to NLRB's primary jurisdiction to establish that the "activity or conduct [is] defined as an unfair labor practice" is prerequisite to the damage suit.

Conclusion

For the foregoing reasons, writ of certiorari should be granted herein.

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APPENDICES

APPENDIX A

Statutory Provisions

The relevant provisions of the Labor Management Relations Act of 1947, as amended, are as follows:

Section 8(b) [29 U.S.C. §158(b)]:

"It shall be an unfair labor practice for a labor organization or its agents —

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forc-

ing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;" [73 Stat. 542]

Section 10 [29 U.S.C. §160]:

"(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. . . ."

Section 303 [29 U.S.C. §187]:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158 (b) (4) of this title. [73 Stat. 545.]

"(b) Whoever shall be injured in his business

or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit." [61 Stat. 158.]

THE STATUTE AS AMENDED

Section 303 as originally enacted in 1947 is set out below, with the portions which were eliminated by the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, being enclosed by brackets; provisions added by the 1959 Act are in italics; and unchanged portions are shown in roman type.

Boycotts and Other Unlawful Combinations

SEC. 303. (a) It shall be unlawful for the purpose[s] of this section only, in an industry or activity affecting commerce, for any labor organization to engage in[, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—]

[(1) forcing or requiring any employer or self-employed person to join any labor or em-

ployer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;]

[(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;]

[(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;]

[(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a

strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.]

any activity or conduct defined as an unfair labor practice in section 8(b)(4) *of the National Labor Relations Act, as amended.*

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21198

AIRCRAFT & ENGINE MAINTENANCE & OVERHAUL, BUILDING, CONSTRUCTION, MANUFACTURING, PROCESSING AND DISTRIBUTION AND ALLIED INDUSTRIES EMPLOYEES, LOCAL 290, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Appellant,

versus

OOLITE CONCRETE COMPANY,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(February 2, 1965.)

Before TUTTLE, Chief Judge, MOORE* and BELL, Circuit Judges.

TUTTLE, Chief Judge: This is an appeal from a jury verdict and judgment against the appellant Local for damages for violation of some of the

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*Of the Second Circuit, sitting by designation.

provisions of Section 303 of the Labor Management Relations Act, 29 U.S.C.A. §158(b)(4).[1]

The gist of the offense is stated in the complaint as follows:

> "This is a suit for damages resulting from the activities of defendant labor organization in inducing and encouraging individuals employed by persons engaged in commerce, or in an industry affecting commerce, to engage in a strike and a refusal in the cause of their employment to use, process, or otherwise handle materials or to perform any services with an object of forcing and requiring John A. Volpe Construction Company, Prahl Bros. Construction Company, Millman Construction Company, et al, to cease using the products of plaintiff and to cease doing business with plaintiff."

Two questions are raised on this appeal. The first is whether the failure of the National Labor Relations Board to proceed on an unfair labor practice charge arising out of this same conduct is res

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[1] Section 8(b)(4), of the Labor Management Relations Act, as amended, makes it an unfair labor practice for a union or its agents:

"(i) to engage in, or to induce or encourage any individual employed by any persons engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object there of is—

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . PROVIDED, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . ." 29 U.S.C.A. § 158(b)(4) (A, B).

judicata and thus a bar to the action; the second question is whether there was sufficient evidence to warrant submission of the case to the jury, it being contended by the appellant that it was entitled to a directed verdict at the conclusion of the evidence, and, in the alternative, for a judgment notwithstanding the verdict.

This Court has dealt with the question of res judicata when the Labor Board declines to proceed with an unfair labor practice charge in the case of *Aircraft & Engine Maintenance Employees v. Schilling Company*, 5 Cir., . . . F. 2d . . ., No. 20920, decided January 12, 1965. We concluded there that the right of the employer to file such suit as is here before us is not affected by the circumstance that the Labor Board declines to proceed with an unfair labor practice charge. This disposes of that contention here.

We turn next to the question of the sufficiency of the evidence to warrant submission of the case to the jury. This case is quite similar to the *Schilling* case referred to above. In fact the appellant says in its brief:

> "The case is identical to [the Schilling case] presently pending before this Court . . . The incidents which led to the institution of that suit occurred approximately one month prior to the acts complained of in the complaint as the basis for the damages in the instant case. Both cases involve the same relevant issues of law and fact, and though not companion cases, are certainly related."

In the *Schilling* case this Court held that the verdict of the jury was amply supported by the evidence. While the evidence there was somewhat different from that presented to the jury here, with respect to one large work stoppage, nevertheless we think it plain that there was sufficient evidence here from which the jury could infer that an object of the picketing at several of the common sites was the prohibited one of coercing other employers from continuing their business relations with the appellee.

Pickets for the appellant, while picketing the principal plants or places where the concrete was mixed, sporadically, also picketed several pouring sites where the mixed concrete was being poured on the jobs of the several other employers mentioned in the complaint. In each instance, when the pickets appeared there was a work stoppage by the employees of other crafts engaged on the job. In each instance it was necessary for Oolite to stop deliveries with its non-union drivers.

One circumstance which the jury could consider as showing an intent that the picketing should produce the result that it actually brought about rather than that it was for a legal purpose was: at one location the pickets were not within sight of the Oolite employees who were the only proper target of the signs carried by the pickets. Dealing with a subject similar to this in *Brown Transport Corp. v. NLRB,* 5 Cir., 334 F. 2d 30, we said:

> "Picketing that has the effect of interfering with the work of neutral third parties, and which can not have the effect of appealing to the employees of the primary employer can have no other purpose than that which was actually achieved here in blocking the entrance and exit . . . to all other truckers."

Another circumstance was that, as was the fact in the case of *Schilling, supra,* the pickets did not continue picketing at the site of jobs where their presence did not cause an interruption of the work by employees of other employers. A third circumstance was that pickets were not placed at some sites where Oolite was delivering concrete where there were no other employees present to be made the target of the picketing. Finally, it was stated by witnesses for the appellant that the most suitable place for reaching the drivers of Oolite Concrete Company was at the plants of the company, but the record discloses that none of the pickets were present at these primary sites at the time when the drivers left on their first trips in the morning.

Appellee also stresses the fact that the record is silent as to any efforts made by appellant or its pickets to prevent the work stoppages which appellant contended were the unintended result of its actions. Here there is no doubt of the effect that the pickets had on secondary employers. They effectively broke up the relationship between the general contractors on the jobs and Oolite Concrete Company so long as they continued in their

picketing activities at the common sites. In *Superior Derrick Corporation v. NLRB*, 5 Cir., 273 F. 2d 891, dealing with this problem, we stated:

> "If there is an expectation or hope or a desire that employees of the secondary employer will be induced or encouraged to take considered actions so that the secondary employer will cease doing business with the primary employer, then the Act bars that activity . . . The activity, including the picket line, must be conducted in such a way that the normal appeal of a picket line is overcome. It must be done so that all secondary employees will know that the primary union does not seek what the law forbids — pressure on the primary employer through pressure from the secondary employer because of concerted pressure by secondary employees on that secondary employer." 273 F. 2d 891, 897.

We think it clear that the jury here could infer from the course of conduct which has been outlined above that there was at least "an expectation or a hope or a desire that employees" of the other crafts engaged on these several jobs would take the action which they actually did take—that is to quit working behind the picket signs.

It was, therefore, not error for the trial court to submit the issue to the jury whose finding is determinative of the question.

There is no merit in the contention that the trial court refused to give the requested charge which, in effect, would state that so long as the appellant

did no more than observe the criteria known as the Moore Dry Dock criteria, 92 NLRB 547, there was a presumption that the picketing was legal. The requested charge was not an accurate statement of the law to be given to the jury, since it was entirely too broad. The charge, as given, was adequate and without error.

The judgment is AFFIRMED.

APPENDIX C

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21198

D. C. Docket No. 360-62-Civil-EC

AIRCRAFT & ENGINE MAINTENANCE & OVERHAUL, BUILDING, CONSTRUCTION, MANUFACTURING, PROCESSING AND DISTRIBUTION AND ALLIED INDUSTRIES EMPLOYEES, LOCAL 290, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Appellant,

versus

OOLITE CONCRETE COMPANY,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, Chief Judge, MOORE* and BELL, Circuit Judges.

* Of the Second Circuit, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Aircraft & Engine Maintenance & Overhaul, Building, Construction, Manufacturing, Processing and Distribution & Allied Industries Employees, Local 290, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

February 2, 1965

Issued as Mandate:

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JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 1107 86

AIRCRAFT & ENGINE MAINTENANCE & OVERHAUL, BUILDING, CONSTRUCTION, MANUFACTURING, PROCESSING AND DISTRIBUTION AND ALLIED INDUSTRIES EMPLOYEES, LOCAL 290, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Petitioner,

versus

OOLITE CONCRETE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 1107.

AIRCRAFT & ENGINE MAINTENANCE & OVERHAUL, BUILDING, CONSTRUCTION, MANUFACTURING, PROCESSING AND DISTRIBUTION AND ALLIED INDUSTRIES EMPLOYEES, LOCAL 290, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Petitioner,

versus

OOLITE CONCRETE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PRELIMINARY STATEMENT.

Respondent opposes the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on February 2, 1965, which affirmed a damage judgment rendered in the action brought by Respondent under § 303 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 187.

Pursuant to Rule 40, paragraph 3, of the Rules of this Honorable Court, Respondent adopts as correct the statements contained in the Petition with respect to the Opinion below (petition p. 2) and Statute involved (petition p. 3).

JURISDICTION.

The Supreme Court of the United States has jurisdiction to review this decision entered herein by the United States Court of Appeals for the Fifth Circuit, but Respondent respectfully submits that in the exercise of sound judicial discretion the Honorable Court will deny review since the decision of the United States Court of Appeals for the Fifth Circuit does not conflict with the decision of any other United States Courts of Appeal, does not decide issues not already decided by this Honorable Court, and is not in conflict with any decisions of this Honorable Court.

QUESTIONS PRESENTED.

1.

Whether or not sound judicial discretion will allow a writ of certiorari herein when the decision of the court below does not decide any issue not already decided by the Supreme Court of the United States, does not conflict with any decisions of the Supreme Court of the United States, and does not conflict with the decisions of any other United States Courts of Appeal?

2.

Whether or not the National Labor Relations Board has primary jurisdiction of an action brought in the United States District Court under the provisions of § 303 of the Labor Management Relations Act?

3.

Whether or not a *per se* doctrine is determinative of the legality, under § 303 of the Labor Management Relations Act, of a Union's ambulatory picketing of an employer?

STATEMENT OF THE CASE.

Respondent, Oolite Concrete Company, a supplier of ready-mixed concrete, was engaged in supplying concrete to various contractors and construction projects in the Miami, Florida, area during the summer of 1962 (R.14). Respondent operated three ready-mixed concrete plants, one in South Dade County, one in North Dade County, and one at S. W. 71st Avenue in Miami, referred to in the record as Bird Road Plant (R.14). The events out of which this action arose involved the employees of the Bird Road Plant and the North Dade Plant; Respondent employed from 16 to 18 ready-mix concrete truck drivers at the Bird Road Plant and from 12 to 14 at the North Dade Plant (R.15).

On the morning of June 7, 1962, at approximately 8 a.m., (R.29) pickets appeared at Respondent's Bird Road Plant (R.15). They carried signs reading "Oolite Concrete

Company drivers receive substandard wages and working conditions. Teamsters Local Union 290" (R.153).

The pickets remained at the plant site 20 to 30 minutes and followed trucks to several construction projects which were being supplied by Respondent, Oolite, with ready-mixed concrete (R.15). These included the construction by John A. Volpe Construction Company of a "Federal Building" in Miami (R.71, 131); Prahl Brothers Construction Company of a Howard Johnson's Restaurant (R.52); and Millman Construction Company of a Zayre's Department Store (R.60).

At the Volpe project, the job was surrounded by a high board fence with gates on each of the three streets providing access to the site (R.17). At this job, the trucks would wait across the street from the job on a parking apron until they were signaled to come on to the construction site for discharge of their concrete (R.81-82). The concrete was discharged inside the high board fence (R. 82-83). After the picketing commenced, the workmen at the Federal Building project refused to handle the concrete. This resulted in a temporary stop in the work on the building.

On the morning of June 8, 1962, pickets again appeared at the Federal Building job and pouring was stopped since the Laborers' Union refused to handle the concrete and the iron workers walked off the job. Other crafts or trades did not walk off the job but engaged in a sit-down (R.68). The pickets did not attempt to enter the job in

order to picket the trucks (R.90). Volpe, after giving Oolite "a day or two to try to get themselves straightened out", on June 13, 1962, forced Oolite to fulfill its contract through another supplier. Arrangements were made by Oolite for Acme Concrete Company to deliver the concrete to fulfill Oolite's contract (R.68-69).

The Prahl construction project was of a Howard Johnson's restaurant; picketing was carried on twice (R.30, 53). This job site was also unusual in that pickets could not be seen from where the trucks discharged their loads (R.31). At this project upon appearance of pickets, the workmen, including the iron workers, carpenters, and electricians, walked off the job (R.51, 53). At the time of the second picketing, all workmen except the laborers and cement finishers stopped work. These employees continued to work since they were engaged in the process of pouring floors (R.53). After these two work stoppages, Mr. Prahl advised Oolite "to get the trucks off the job" (R.54). Oolite made arrangements with Maule Industries, Inc., another supplier of concrete, to deliver its contract commitments to the Howard Johnson construction site (R.54).

Similarly, at the Millman project, the Zayre Department Store construction site, picketing was carried on twice (R.60). On the first day pickets appeared as Oolite trucks appeared at the job site. The iron workers and carpenters sat down and refused to work during the unloading of two of four Oolite trucks. The construction superintendent turned the other two trucks away, thereby preventing de-

livery by Oolite (R.61). After a lapse of one day, four more loads of concrete were ordered for the Millman project. Again, the picketing commenced, the employees sat down and refused to work and two trucks were turned away (R.62). Arrangements were then made with Maule to deliver the remainder of the concrete under Oolite's commitment (R.62-63). The pickets did not request to come on the job site to picket the trucks (R.63).

At several other job sites, picketing was carried on only once. These included the projects at Golden Glades Interchange, Starr Charm Homes, and May Gold Homes. At none of these projects was there any work stoppage (R.33, 131). At another project, the Cochran Filling Station job (at which there were only two workmen), no picketing was carried on, even though the Union president, who had engaged in the picketing at other job sites, and other pickets drove past the site slowly during the pouring when two of Respondent's trucks were present or appeared (R.84-85). They did not stop and picket their trucks.

The Union's asserted purpose in picketing was to let Oolite employees "know that they are getting substandard wages in general" (R.143). Picketing at Respondent's plants was only sporadic and limited to twenty minutes or half an hour and was admittedly for the primary purpose of observing trucks as they left the plant in order to follow them to job sites where picketing could be carried on (R.120). Although starting time for the drivers was 7 a.m., pickets were never observed at the plant prior to 8 a.m. (R.26, 30). The Union through its officers or through the

pickets made no efforts to prevent work stoppages which it contended were the unintended results of the picketing.

Oolite filed a petition for an election with the National Labor Relations Board and filed an unfair labor practice charge alleging violation of § 8(b)(4)(ii) of the Labor Management Relations Act. Picketing ceased and an election was held in which the drivers voted not to be represented by the Teamsters Union.[1] The charges filed with the National Labor Relations Board which alleged that the Union was engaging in violation of the secondary boycott proscription of the Act was an effort to have the Regional Director seek an injunction under the provisions of the Act. The Regional Director did not proceed as authorized and the charge was dismissed.

The jury rendered a verdict in favor of Oolite in the amount of $3,136.00 for damages. The Fifth Circuit Court of Appeals affirmed the verdict and held that there was evidence from which the jury could infer unlawful conduct as alleged, and that there was no error in the trial court's failure to submit defendant Union's requested charge to the jury, since it was "entirely too broad" and "was not an accurate statement of the law".

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[1] The charge was filed on June 19, 1962 (R.114), and according to the Union, the picketing ceased on June 20. The election was held in the latter part of July.

REASONS FOR REFUSING TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

POINT ONE.

THERE IS NO *PER SE* RULE FOR DETERMINING LEGALITY OF PICKETING WHICH INDUCES SECONDARY EMPLOYEES TO RESPECT A PICKET LINE; THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS OF APPEAL AND IS SUPPORTED BY THE EVIDENCE.

The Petition advances, as a reason for granting the Writ, the fact that the Fifth Circuit Court of Appeals has misapplied the statute and "deprived workers of the right of primary picketing". This case is characterized as another in a line of cases in which the court below has purportedly disregarded cases decided by this Court, specifically, *Local 761 v. N.L.R.B.* (General Electric), 366 U.S. 667 (1961), and *United Steelworkers v. N.L.R.B.* (Carrier), 376 U.S. 492 (1964).

The attack upon the Fifth Circuit Court of Appeals[2] has no basis. The cases relied upon are clearly distinguishable and involve different considerations in applying the statute. The *General Electric* and *Carrier* cases considered the application of § 8(b)(4) of the Act in an unfair labor practice proceeding. The *General Electric* case involved

[2] Note that in the case of *Superior Derrick Corp. v. N.L.R.B.*, 273 F.2d 891 (5th Cir. 1960), so severely criticized by Petitioner certiorari was denied. 364 U.S. 816 (1960).

a Union's right to picket a "separate gate" at a struck employer's plant site. The separate gate was reserved for independent contractors' employees performing work at the struck plant. *Carrier* involved the Union's right to picket a railroad right of way (asserted to be a separate gate) used to make deliveries to the plant. The entrance was held to be so "proximate and related to employer's day to day operations" as to be a gate of Carrier. The distinction between these cases and the instant case is not subtle but very real and obvious. The picketing involved in this case was picketing of construction job sites at which Oolite (the employer) made truck deliveries of ready-mixed concrete. The specific problem in *General Electric* was whether the Dry Dock criteria (developed in a "common situs" situation) could be applied to picketing at the "primary site"! The construction sites were secondary sites (rather than primary) to which Oolite made deliveries.

Petitioner is not only erroneous in its assertion that the court misapplied the statute, but contrary to this Court's reasoning, Petitioner urges a *per se* rule for determining legality of picketing.

In the *General Electric* case, this Court observed:

> As is too often the way of law or, at least of adjudications, the Dry Dock tests were mechanically applied so that a violation of one of the standards was taken to be presumptive of illegal activity.

Petitioner seeks to have this Court rule that if a Union's picketing conforms to the Dry Dock standards it is *per se*

legal and an unlawful motive would be irrelevant.[3] This Court did not approve the mechanical application of the tests, and the N.L.R.B. has expressly denounced a *per se* application of the tests. In *Plauche Electric, Inc.*, 135 N.L.R.B. 250 (1962), the Board stated:

> These standards (Dry Dock) are not to be applied on an indiscriminate "per se" basis, but are to be regarded merely as aids in determining the underlying question of statutory violation. 135 N.L.R.B. at 255.

Petitioner in urging the *per se* application of the Dry Dock standards states in its brief:

> As this Court has noted the N.L.R.B. 'modified and reformed its standards on the basis of accumulating experience' (citing General Electric) and concluded that *when (as here) the situs of the primary employer was 'ambulatory'* there were four objective standards to be applied in determining whether the challenged picketing was primary and therefore lawful. . . .

Petitioner ignores the fact that the *situs* of the primary employer was not ambulatory since Oolite had three plant sites, and each driver spent considerable time at the plant and entered and left the plant approximately six to twelve times per day. In the *Moore Dry Dock* case the situs of the dispute was a ship and the dry dock or secondary premises was the *only* place where picketing

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[3] One of Petitioner's distinguished law firms argued just as vehemently (and successfully to the Fifth Circuit) that the Dry Dock tests should not be mechanically applied. *N.L.R.B. v. General Drivers, Warehousemen & Helpers, Local 968*, 225 F.2d 205 (5th Cir. 1955).

could take place. Note that a fifth criteria was added to the Dry Dock standards by *Washington Coca Cola Bottling Works, Inc.*, 107 N.L.R.B. 299 enf'd 220 F.2d 380 (D.C. Cir. 1955), namely, where a primary employer had a permanent place of business at which the dispute could be publicized, it was unlawful to picket a "common situs". Later, Appellate Courts refused to follow this rule and the Board abandoned it in *Plauche Electric, Inc., supra.* However, it is important to observe (and Petitioner failed to note) that the Board specifically pointed out it was not holding that the place of picketing was irrelevant in determining the legality of the picketing. The place of picketing and the existence of a permanent place of business which could be picketed is "one circumstance among others in determining the object of the picketing".

The evidence from which the jury did conclude that a purpose of the Teamster picketing was to induce the secondary employees to engage in a concerted refusal to work for the object of forcing John A. Volpe Construction Co., Prahl Brothers Construction Co., and Millman Construction Co. to cease dealing with Oolite has been summarized above.

Admittedly, the picketing at job sites was carried on where the pickets were not within sight of Oolite employees. *Brown Transport Corp. v. N.L.R.B.*, 334 F.2d 30 (5th Cir. 1964). Petitioner made no efforts to follow the trucks on the job site or to seek permission to picket as close to the truck as possible. There is no evidence that Petitioner made any effort to prevent work stoppages which it contended were not the intended result of the

picketing. On the contrary, pickets did not continue picketing job sites where their presence did not cause a walk-out, sit-down, refusal to work, or other interruptions. Pickets were not placed at sites where Oolite was delivering concrete where there were no other employees present to be made target of the picketing. Picketing of the plants was sporadic, for short periods (twenty to thirty minutes) and for the purpose of following a truck to a construction site. Pickets made no effort to be at the plant at the beginning or close of the work day.

These factors justify the jury's finding of the Union's unlawful purpose and demonstrate that the Dry Dock criteria were not in fact met. The verdict based on the Union's violation of the statute, affirmed by the court of appeals, is based on fact and is not contrary to law.

This Court has firmly stated that where there is an evidentiary basis for the jury's verdict, the jury is free to discredit and disbelieve whatever evidence that is inconsistent with its conclusion. *Dennis v. Denver & Rio Grande Western R.R. Co.*, 373 U.S. 208 (1963); *Lavender v. Kurn*, 327 U.S. 645 (1946).

Petitioner seeks to have a redetermination of this case made on its facts; obviously the "facts" which the jury did not believe. In *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959), the court commented on the role of courts in this area:

> Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could

have drawn different inferences or conclusions or because judges feel that other results were more reasonable.

As stated above, the record contains abundant evidence to support the jury verdict, as recognized by the court of appeals. The writ requested should not be granted.

POINT TWO.

THIS COURT HAS PREVIOUSLY REJECTED THE ARGUMENT THAT THE LANDRUM-GRIFFIN AMENDMENTS TO § 303(a), 29 U.S.C. § 187(a) REQUIRE RESORT TO N.L.R.B.'S PRIMARY JURISDICTION TO ESTABLISH THE EXISTENCE OF AN UNFAIR LABOR PRACTICE AS A PREREQUISITE TO A DAMAGE SUIT UNDER THE PROVISIONS OF § 303.

Contrary to Petitioner's contention this and the case of *Aircraft, etc., Local 290, I.B.T. v. Schilling*, on application for certiorari No. 1057, October Term, 1964, are not the first cases in which this Court has had an opportunity to determine the effect of the Landrum-Griffin Amendments with respect to § 303 (29 U.S.C. § 187). *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964), involved a suit brought by an employer under § 303 and under the common law of Ohio. In affirming the award of compensatory damages for the violation of § 303, this Court made the following observation:

> Section 303(b) of the Labor-Management Relations Act expressly authorizes state and federal courts to award damages to any person injured by certain

> secondary boycott activities described in § 303(a). The type of conduct to be made the subject of a private damage action was considered by Congress, and § 303(a) comprehensively and with great particularity "described and condemns specific union conduct directed to specific objectives." Carpenters Local 1976 v Labor Board, 357 US 92, 98, 2 L ed 2d 186, 1193, 78 S Ct 1011.

Additionally, in footnote 13 the Court, it is respectfully submitted, disposed of Petitioner's contentions concerning the effect of the Landrum-Griffin Amendments:

> Section 8(b)(4), 29 USC § 158(b)(4), and § 303, 29 USC § 187, "having an identity of language" but specify two "different remedies". Longshoremen v. Juneau Corp. 342 US 237, 244, 96 L ed 275, 281, 72 S Ct 235. Section 8(b)(4) provides that certain conduct constitutes an unfair labor practice for which an administrative remedy is afforded. The same conduct under § 303 *also* gives rise to a claim for damages cognizable in either state or federal courts. *As a consequence of the 1959 amendments to the Act, § 303 now incorporates by reference the prohibitions embodied in § 8(b)(4).* (Emphasis supplied.)

This Court considered at some length the contention here raised by Petitioner in *International Longshoremens' and Warehousemens' Union v. Juneau Spruce Corp.*, 342 U.S. 237 (1952), and in rejecting the contention the Court stated:

> The main contention of petitioners in the case is that § 303(a)(4) read in light of § 8(b)(4)(D) renders illegal only such picketing as takes place after and in

face of a determination by the Board that acts complained of were unfair labor practices. . . .

Section 8(b)(4)(D) and § 303(a)(4) are substantially identical in the conduct condemned. Section 8(b)(4)(D) gives rise to an administrative finding; § 303(a)(4) to a judgment for damages; The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of each other. Certainly there is nothing in the language of § 303(a)(4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather the opposite seems to be true. . . . (342 U.S. at 243-44.)

N.L.R.B. v. Radio & Television Broadcast Engineers' Union, 364 U.S. 573 (1961), was decided after the Landrum-Griffin Amendments, and in this case this Court adhered to its decision in *Juneau Spruce Corp., supra*, stating:

A second inconsistency is urged with § 303(a)(4) of the Taft-Hartley Act, which authorizes suits for damages suffered because of jurisdictional strikes. The argument here is that since § 303(a)(4) does not permit a union to establish, as a defense to an action for damages under that Section, that it is entitled to the work struck for on the basis of such factors as practice or custom, a similar result is required here in order to preserve "the substantive symmetry" between § 303(a)(4) on the one hand and §§ 8(b)(4)(D) and 10(k) on the other. This argument ignores the fact that this Court has recognized the separate and distinct nature of these two approaches to the problem. . . . (364 U.S. at 584-85.)

Petitioner finds "sparse" legislative history to support its contention. While pertinent legislative history may be sparse, it establishes that this Court's interpretation in *Morton, supra,* is correct. Representative Lafore, in offering an amendment to § 303, which embodied, in essence, the language finally adopted, commented:

> Section 303 of the present Taft-Hartley Act is the section which provides for damages resulting from the unfair labor practices set out in § 8(b)(4). My bill makes no change in the overall idea of § 303. It merely streamlines it and brings it into conformity with the new changes in § 8(b)(4).
>
> The present § 303(a) is eliminated as repetitious and unnecessary. It is covered by reference to avoid repeating all the unfair labor practices set our in § 303(b) of the present law. 105 CONG. REC. 3512, daily ed. March 11, 1959.

In view of this Court's decision in *Juneau Spruce, supra,* had Congress intended to vest primary jurisdiction in the N.L.R.B. in the case of § 303 damage suits, it would have used plain and unambiguous language to accomplish this purpose.

Finally, in support of the rule established by this Court is the fact that decisions of the General Counsel of the N.L.R.B. are not reviewable. *Hourihan v. N.L.R.B.,* 201 F.2d 187 (D.C. Cir. 1952), *cert. denied* 345 U.S. 930 (1953); *Dunn v. Retail Clerks Int'l Assoc.,* 307 F.2d 285 (6th Cir. 1962). To sustain Petitioner's contention would mean that the Respondent would never have its day in court.

Clearly, Congress did not intend, nor did it amend the law so as to make an N.L.R.B. finding, that the conduct of which an employer complains was an unfair labor practice, a prerequisite to such employer maintaining a § 303 damage suit.[4]

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[4] At Page 16 of its petition, Petitioner cites and quotes from an article by Professor Louis L. Jaffe in *Primary Jurisdiction*, 77 HARV. L. REV. 1037 (1964). In another portion of this article, Professor Jaffe approves the action of Congress and this Court with respect to concurrent jurisdiction by the Courts and the N.L.R.B.:

> The conflicts so glibly supposed to follow from the excesses of parallel and concurrent jurisdiction by courts and agencies have not proved, in the case of the NLRB, sufficiently consequential to justify an exclusion of court jurisdiction. At one time the Supreme Court thought even the remotest possibility of conflict sufficient to oust the jurisdiction of state courts. This point of view on the one hand overstates the likelihood and significance of conflicts and on the other sets up an unreal goal of doctrinal and factual harmony. Moreover, a federal agency's resources of money, time, and men are rarely adequate to its farflung jurisdiction, and this exaggerated application of the doctrine of preemption created a no man's land of cases which the state courts were forbidden to handle and the Board could not. In response, Congress in the Taft-Hartley Act authorized the federal courts to enforce collective bargaining agreements and more recently has qualified preemption in this area by allowing state courts to exercise their traditional jurisdiction when the NLRB declines. . . . The Supreme Court has now wisely decided to allow the exercise of court jurisdiction despite the presence of potential NLRB jurisdiction, at least in the absence of "serious problems" of conflict. It is to be hoped that in the exercise of this jurisdiction it will seldom be necessary to invoke the doctrine of primary jurisdiction. (Footnotes Omitted.)

CONCLUSION.

For the reasons set forth above the writ of certiorari should not be granted.

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